

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SAMUEL H. MCGLOTTEN,	§
	§
Defendant Below-	§ No. 634, 2009
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID 0707015477
Plaintiff Below-	§
Appellee.	§

Submitted: May 18, 2011

Decided: July 25, 2011

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

This 25th day of July 2011, upon consideration of the parties' briefs, the Superior Court's order on remand, and the parties' supplemental memoranda, it appears to the Court that:

(1) The appellant, Samuel McGlotten, filed this appeal from the Superior Court's summary dismissal of his first motion for postconviction relief. After considering the parties' briefs, we remanded the matter to the Superior Court for expansion of the record and reconsideration of the merits of McGlotten's ineffective assistance of counsel claims. The Superior Court issued its expanded decision on remand and the parties have filed supplemental memoranda in response. After careful consideration of all the issues, the Court finds no merit to

McGlotten's appeal. Accordingly, the judgment of the Superior Court shall be affirmed.

(2) The record reflects that McGlotten was arrested in 2007 and charged with multiple drug-related crimes. The evidence at trial established that a police informant named William Holloman contacted McGlotten to arrange for a drug purchase at a gas station. The police recorded the phone calls between Holloman and McGlotten by holding a tape recorder up to Holloman's telephone. These recordings were admitted into evidence. After arranging the drug purchase, the police officers then conducted surveillance of the gas station at the appointed time. Officers saw McGlotten drive his car into the parking lot, park next to a portable toilet and exit the vehicle. McGlotten stood next to the passenger side of the car and called Holloman to let him know where he was. The front seat passenger in McGlotten's car then exited the vehicle and went into the toilet. Officers approached McGlotten and apprehended him as he was about to enter the driver's side of the vehicle. On the ground where he had been seen standing, the officers found over 40 grams of cocaine packaged in smaller baggies. The officers arrested McGlotten and thereafter conducted a taped interview. Prior to trial, the State provided defense counsel with a summary of McGlotten's statement but failed to provide the tape itself. Trial counsel objected to admission of the tape. The

Superior Court took a recess to allow defense counsel to listen to the tape. Thereafter, defense counsel withdrew the objection.

(3) The jury convicted McGlotten of one count each of trafficking cocaine, possession with intent to deliver cocaine, maintaining a vehicle for keeping controlled substances, and possession of drug paraphernalia. The Superior Court sentenced McGlotten to a total period of forty-nine years at Level V incarceration, to be suspended after serving twenty-five years in prison for decreasing levels of supervision. This Court affirmed McGlotten's convictions on direct appeal.¹

(4) Thereafter, McGlotten filed his first motion for postconviction relief, asserting multiple claims of ineffective assistance of counsel. The Superior Court summarily denied McGlotten's motion. After the parties filed their briefs on appeal, the Court concluded that the matter should be remanded to the Superior Court for expansion of the record and reconsideration of the merits of McGlotten's ineffectiveness claims. On remand, the Superior Court allowed McGlotten to amend his postconviction motion to include additional ineffectiveness claims. The Superior Court also obtained responses from McGlotten's trial counsel and from counsel for the State. In a thoughtful, twenty-seven page opinion, the Superior Court denied all of McGlotten's claims and returned the matter from remand.

¹ *McGlotten v. State*, 2008 WL 5307990 (Del. Dec. 22, 2008).

(5) In his opening brief on appeal, McGlotten claims that his trial counsel was ineffective because he failed to: (i) pursue an objection to the State’s untimely disclosure of the taped police interview of McGlotten; (ii) object to an untimely preliminary hearing; (iii) investigate his case and obtain witness statements; (iv) file a discovery motion; (v) file a motion to dismiss based on continuances granted to the State while waiting for the medical examiner’s report; (vi) object to perjured testimony; (vii) file a motion to suppress; (viii) file a motion for a judgment of acquittal; (ix) assert his right not to wear prison garb during trial; and (x) request an accomplice credibility instruction.

(6) An application for postconviction relief alleging ineffective assistance of counsel must establish that: (i) trial counsel’s representation fell below an objective standard of reasonableness; and (ii) but for counsel’s unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different.² A “reasonable probability” means a probability that is sufficient, considering the totality of the evidence, to undermine confidence in the outcome.³ A defendant must set forth and substantiate concrete allegations of actual prejudice⁴ in order to overcome the “strong presumption” that counsel’s representation was professionally reasonable.⁵

² *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

³ *Id.* at 694-95.

⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁵ *Strickland v. Washington*, 466 U.S. at 689.

(7) McGlotten's first argument is that trial counsel was ineffective for failing to pursue his objection to the State's untimely disclosure of the taped police interview. McGlotten raised the issue of the State's untimely disclosure as a ground for reversal in his direct appeal. We held then that the record did not reflect "that an earlier disclosure of the recording would have resulted in a different outcome at trial."⁶ Defense counsel initially objected to the untimely disclosure but withdrew the objection after listening to the tape and determining that it did not contain any incriminating or prejudicial material. Also, the written summary of the tape, which had been timely disclosed by the prosecutor, accurately summarized the contents of the tape and thus McGlotten had not suffered any prejudice from the untimely disclosure. Under the circumstances, McGlotten cannot establish that his trial counsel was ineffective for failing to pursue a meritless objection at trial.

(8) McGlotten next argues that his trial counsel was ineffective for failing to object to his untimely preliminary hearing, which was held fourteen days after his arrest.⁷ In this case, the preliminary hearing was scheduled for July 19, 2007, seven days after his initial appearance before the committing magistrate, but was postponed for another seven days because the testifying officer was not available.

⁶ *McGlotten v. State*, 2008 WL 5307990, at *2.

⁷ Superior Court Criminal Rule 5(d) provides, among other things, that a defendant is entitled to a preliminary hearing within 10 days of the defendant's initial appearance before the magistrate if the defendant is being held in custody. The ten-day time limit may be extended with the defendant's consent.

Defense counsel did not object to a continuance. In reviewing McGlotten's claim below, the Superior Court held that even if counsel had objected to the continuance and the court had dismissed McGlotten's case at the preliminary hearing stage, the State still would have been entitled to seek an indictment against McGlotten on the same charges. In fact, the grand jury did indict McGlotten in this case on August 13, 2007. Accordingly, McGlotten cannot establish any prejudice from his counsel's failure to object to the brief delay in his preliminary hearing.

(9) McGlotten's third argument is that counsel was ineffective for failing to investigate his case and obtain witness statements. In his affidavit, however, trial counsel disputes McGlotten's contention and asserts that he received the police reports with the witness statements prior to trial and provided copies to McGlotten. Trial counsel discussed the case with detectives and the prosecutor, reviewed tapes of the preliminary hearing, and listened to the audio tapes of the recorded conversations between McGlotten and Holloman. Defense counsel indicated that he declined to interview the female passengers who were in McGlotten's vehicle because he did not want to learn information that may have negatively impacted McGlotten's defense. Instead, counsel's strategy was to use the absence of these witnesses to suggest that one of those passengers was responsible for the drugs found next to the vehicle thereby creating reasonable doubt. Under these circumstances, we agree with the Superior Court's conclusion

that trial counsel's strategy was reasonable and that McGlotten failed to establish ineffective assistance.

(10) McGlotten next claims that counsel was ineffective for failing to file a specific request for discovery under Rule 16. Defense counsel explained in his Rule 61 affidavit, however, that he had received automatic discovery from the State pursuant to an agreement and that McGlotten received all of the discovery materials that counsel otherwise would have requested pursuant to Rule 16. Again, we agree with the Superior Court's conclusion that McGlotten can establish neither error nor prejudice with respect to this claim.

(11) McGlotten next asserts that counsel was ineffective for failing to file a motion to dismiss based on continuances granted to the State while awaiting production of the medical examiner's report. Defense counsel explained, however, that he did not oppose the State's request for a two-week continuance after the State agreed that it would dismiss all charges if the results of the report were not received within that period of time. The Superior Court, in denying McGlotten's ineffectiveness claim, explained that a two-week delay of trial because of the missing report would not have been grounds for dismissal of the case. Accordingly, McGlotten is unable to establish any prejudice from counsel's failure to file a motion to dismiss because, as the Superior Court explained, there was not a sufficient basis for such a motion, and it would have been denied.

(12) Next, McGlotten argues that his counsel was ineffective for failing to object to the alleged perjured testimony of two witnesses. First, McGlotten asserts that the officer who testified at his preliminary hearing stated that no specific amount of drugs had been mentioned in the conversations between McGlotten and Holloman. At trial, however, a different officer testified that Holloman had ordered an ounce of cocaine from McGlotten. Holloman also testified at trial that he had ordered an ounce of cocaine from McGlotten. Defense counsel, in his affidavit, stated that the preliminary hearing testimony was technically correct because neither McGlotten nor Holloman used the term “an ounce” in their discussions. Nonetheless, there was evidence that, speaking in drug lingo, Holloman had ordered an ounce of cocaine when he told McGlotten, “I need to get straight for tomorrow.” Defense counsel stated that he did not focus too much on the specific agreement between McGlotten and Holloman in his cross-examination of witnesses because he did not want to open the door for the State to introduce evidence of prior drug purchases between Holloman and McGlotten. In fact, defense counsel points out, that when he pressed Holloman on cross-examination about the differences between his testimony and what was heard on the audio tapes, the State objected and argued that if Holloman answered defense counsel’s question it would open up the door to prior drug deals between the two men.

Under these circumstances, McGlotten has not overcome the presumption that counsel's approach was "sound trial strategy."⁸

(13) McGlotten also contends that counsel was ineffective for failing to object to Holloman's allegedly perjured testimony. According to McGlotten, Holloman lied on cross-examination when he responded, "I'm not sure," in response to defense counsel's question about whether the outcome of Holloman's pending criminal charges depended on his testifying against McGlotten at trial. We find nothing to support McGlotten's contention, however, that Holloman's statement constituted perjury. Accordingly, we reject his contention that his trial counsel was ineffective for failing raise such an issue at trial.

(14) McGlotten's seventh claim is that counsel was ineffective for failing to file a motion to suppress: (i) the cocaine seized by police officers in the bag next to McGlotten's car; (ii) the tape of McGlotten's police interview; and (iii) the audio tapes of the phone conversations between McGlotten and Holloman. In response to McGlotten's contention, defense counsel stated that he did not file a suppression motion because there was no legal basis to do so. The cocaine seized by police was found in plain view in a public place and thus was admissible.⁹ McGlotten's taped interview had been conducted after McGlotten was read his

⁸ *Strickland v. Washington*, 466 U.S. at 689.

⁹ *See Williamson v. State*, 707 A.2d 350, 358-59 (Del. 1998).

Miranda rights and also was admissible.¹⁰ The recordings of the phone conversations were made by a police officer holding a handheld tape recorder up to Holloman's phone, with Holloman's consent, while he was engaged in a conversation with McGlotten. Under the circumstances, the recordings were not illegal, as McGlotten contends, under 11 Del. C. § 2402(c)(5)(a).¹¹ We agree with the Superior Court's conclusion that, if counsel had filed a motion to suppress on any of these grounds, it would have been denied as meritless. Accordingly, McGlotten has failed to establish ineffective assistance of counsel in this regard.

(15) McGlotten next argues that counsel was ineffective for failing to file a motion for a judgment of acquittal. On direct appeal, McGlotten raised a similar claim, contending that the evidence was insufficient to support his convictions.¹² We rejected that argument, however, concluding that the State had presented sufficient evidence from which any reasonable juror could have found McGlotten guilty beyond a reasonable doubt. Under the circumstances, we find that McGlotten has failed to establish that the outcome of his trial would have been different if defense counsel had filed a motion for a judgment of acquittal. Accordingly, we reject this claim of ineffective assistance.

¹⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹¹ Section 2402(c)(5)(a) provides that it is lawful for a law enforcement officer in the course of the officer's regular duties to intercept an oral communication if the officer initially detained one of the parties and overhears the conversation.

¹² See *McGlotten v. State*, 2008 WL 5307990, *1.

(16) McGlotten's ninth argument is that defense counsel was ineffective for failing to assert McGlotten's right not to wear prison garb at his trial. As defense counsel explained in his affidavit, however, McGlotten did not request to wear civilian clothing and did not have anyone appear on his behalf before trial to provide civilian clothing. Under the circumstances, we do not find that McGlotten was "compelled" to appear at trial in prison garb.¹³ Although counsel should have advised McGlotten to wear civilian clothing if he could obtain it, we do not find any reasonable probability that the outcome of McGlotten's trial would have been different if McGlotten had been wearing street clothes. Accordingly, we reject McGlotten's ineffective assistance of counsel claim.

(17) Finally, McGlotten claims that defense counsel was ineffective for failing to request a instruction cautioning the jury about relying upon the uncorroborated testimony of McGlotten's accomplice, Holloman.¹⁴ McGlotten is incorrect, however, in his suggestion that Holloman's testimony was uncorroborated. In fact, a police officer overheard the conversations between McGlotten and Holloman and several officers witnessed the arranged drug transaction between the two men. Accordingly, we find no ineffective assistance on defense counsel's part for failing to request an accomplice credibility instruction.

¹³ See *Smith v. State*, 2009 WL 1659873 (Del. June 15, 2009).

¹⁴ See *Bland v. State*, 263 A.2d 286 (Del. 1970).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice